

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 22 August 2005**

**BALCA Case No.: 2004-INA-128**  
**ETA Case No.: P2003-NJ-02499014**

*In the Matter of*

**ANTHONY & HAYLYNNE CARRAMUSA,**  
*Employer*

*on behalf of*

**MA TERESITA V. SOTTO,**  
*Alien.*

Appearance: Primitivo R. Deleon, Esquire  
New York, New York  
*For the Employer and the Alien*

Certifying Officer: Dolores DeHaan  
New York, New York

Before: **Burke, Chapman, and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arose from an application for labor certification on behalf of Ma Teresita V. Sotto ("Alien") filed by Anthony & Haylynn Carramusa ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, New York, New York, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal

File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

## **STATEMENT OF THE CASE**

On April 24, 2001, the Employer filed an application for labor certification to enable the Alien to fill the position of "Household Cook Live-Out," which was classified by the Job Service as "Cook, Domestic-Live-Out." (AF 22). The job duties for the position, as stated on the application, were:

Plans menus & cooks dishes according to recipes & taste of employer. Preps, seasons, cooks, portions & garnishes food. Serves food. Plans for parties. Estimates food use, orders supplies & accounts for expenses. Applicants with no Filipino & Italian Cooking experience will be provided with Filipino & Italian recipes to follow.

Filipino Dishes:

- 1) Kar-Kare – Stewed oxtail tripe in peanut sauce.
- 2) Rellenong Bangus – Stuffed Boneless Milkfish

Italian Dishes:

- 1) Pasta Primavera
- 2) Pasta w/ Bolognese sauce
- 3) Rissoto [sic]

(AF 119). The only stated requirement was two years of experience in the job offered. (AF 119).

In a Notice of Findings ("NOF") issued on November 5, 2003, the CO proposed to deny certification on the grounds, *inter alia*, that the Employer had rejected qualified U.S. applicants for other than lawful job-related reasons. *See* 20 C.F.R. §656.21(b)(6). (AF 35-38). The Employer submitted the rebuttal on November 20, 2003. (AF 39-112). The CO found the rebuttal unpersuasive regarding two of the U.S. applicants (*i.e.*, Lombardi, Schlegal), and issued a Final Determination, dated January 26, 2004, denying certification. (AF 231-233).<sup>1</sup> On or about February 24, 2004, the Employer appealed the

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<sup>1</sup> In the NOF and Final Determination, the CO also questioned whether there is a *bona fide*, full-time job opening for a domestic cook in Employer's household. (AF 35-38, 231-238). However, in view of our decision herein regarding the unlawful rejection of qualified U.S. applicants, it is unnecessary to address this issue.

Final Determination (AF 233-234). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Following the issuance of a Notice of Docketing and Order Requiring Statement of Position or Legal Brief, dated May 20, 2004, the Employer filed a Statement of Position in support of the request for review.

## **DISCUSSION**

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. *See*, 20 C.F.R. §656.21(b)(6) and §656.24(b)(2)(ii). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, in general, an applicant who meets the stated job requirements is qualified for the job in terms of his or her education, training and experience. An employer's rejection of such a qualified U.S. applicant is deemed unlawful. *See, e.g., United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *American Café*, 1990-INA-26 (Jan. 24, 1991); *Richco Management*, 1988-INA-509 (Nov. 29, 1989).

In the report of recruitment results, the Employer provided various reasons for not hiring any of the seven U.S. applicants. (AF 27-28). In pertinent part, the Employer stated that U.S. applicants Paul Schlegel and Dennis Lombardi were rejected because they "did not have any experience as a household cook." (AF 27).

In the NOF (AF 35-38), the CO questioned the Employer's rationale for rejecting these U.S. applicants, noting that Mr. Schlegel "has over ten years as a Cook, Sous Chef, and Chef" and Mr. Lombardi has "over eight years experience as a Cook and Chef." Accordingly, the CO directed the Employer to further document lawful job related reasons for rejecting the U.S. applicants. (AF 35).

The Employer's rebuttal, in pertinent part, consists of a letter by Anthony Carramusa, dated November 20, 2003 (AF 107-112) and an undated statement by Waldo L. Kison, a self-identified expert in the restaurant industry, which contrasts the duties and responsibilities of a restaurant cook from those of a household cook. (AF 102-104). The

crux of the Employer's rebuttal is that the positions of restaurant cook and household cook are two distinct occupations. Relying on the plurality decision in *Bronx Medical and Dental Clinic*, 1990-INA-479 (Oct. 30, 1992)(*en banc*), the Employer argues that the above-referred U.S. applicants were lawfully rejected, because they do not meet the stated job requirement of two years of experience *in the job offered* (i.e., as a household or domestic cook).

In the Final Determination, the CO found the Employer's rebuttal to be unpersuasive. In so finding, the CO cited the duties listed on the ETA 750 A, Item 13, and found that these duties are characteristic of both domestic and restaurant cooks. Accordingly, the CO determined that Messrs. Schlegel and Lombardi are both qualified U.S. applicants. The CO accurately represented that the Employer did not require any prior experience in the specified cuisines (Italian and Filipino). In fact, the Employer's advertisement made no mention of Italian or Filipino cuisine. (AF 231; *See also* 119, 23-25).

The facts of this case are almost identical with those set forth in *Natalie Packer Freedman*, 2003-INA-58 (Mar. 16, 2004). As we stated therein:

In *Bronx Medical*, the Board found erroneous the CO's determination that the employer unlawfully rejected U.S. applicants who did not have the M.B.A. degree required by employer because they had adequate alternative experience. *Id.* *Bronx Medical* is inapplicable here because the requirement of an M.B.A., which is a highly specialized degree that is only attainable through a specific educational curriculum, is not analogous to the experience requirement of a domestic or household cook, since one could attain the experience of cooking family-style meals in a variety of settings, including restaurants. Furthermore, the Employer did not list on the ETA 750A or the job advertisement that an expertise in household cooking was required....

[T]he CO found that despite the distinguishable job titles, the U.S. applicant's cooking experience gained in a commercial setting is the same experience needed to perform cooking in a domestic setting because the duties are the same core duties....

In defining the requirements for the job, experience in the job offered

means experience performing the listed job duties. *Integrated Software Systems, Inc.*, 1988-INA-200 (July 6, 1988). The Board in *Fritz's Garage*, 1988-INA-00098 (Aug. 17, 1988)(en banc), found that an applicant had been unlawfully rejected because expertise in Volkswagen repair was not listed as a requirement on the ETA 750A or in the advertisement; hence, it was an undisclosed requirement. The Board rejected a dissent that concluded that the job requirement was "implicit." The Board also stated that even assuming such a requirement was implicit, the CO would be affirmed because the basis for the rejection was vague and unconvincing. The Board framed the employer's burden in this situation as making "a convincing showing that [the U.S. applicant] could not perform the job in an acceptable manner, as contemplated by §656.24(b)(2)(ii) of the regulations."

*Natalie Packer Freedman, supra.*

As in the *Natalie Packer Freedman* case, we find that the Employer has not met its burden of showing that the above-named U.S. applicants could not perform the job in an acceptable manner, as contemplated by section 656.24(b)(2)(ii) of the regulations. To the contrary, the resumes of Messrs. Schlegel and Lombardi clearly show that they each have many years of cooking experience, albeit in a commercial setting, and that their experience includes the same core job duties as required for the household cook position. (AF 119, Item 13; *Compare* AF 213-215, 218).

In view of the foregoing, we find that labor certification was properly denied.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.